STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2007
v	No. 271013 Macomb Circuit Court
ROBERT WILLIAM PANN, Defendant-Appellant.	LC No. 2000-001355-FC

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to life imprisonment for the murder conviction and to a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.[1]

Defendant's convictions arise from the December 26, 1991, disappearance of his girlfriend, Bernice Gray, whose body was never recovered.

I. Evidentiary Issues

Defendant first argues that numerous evidentiary errors deprived him of a fair trial. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary questions of

[1] We reject plaintiff's argument that this Court lacks jurisdiction over this appeal. The appeal was timely filed from the trial court's order denying defendant's motion for a new trial. Although plaintiff argues that defendant's motion for a new trial, filed in 2001, had been abandoned, thus rendering the claim of appeal untimely, the trial court expressly rejected this argument below. In light of the trial court's determination that defendant did not abandon his timely filed 2001 motion, and that defendant timely filed his claim of appeal from the order denying the motion for a new trial, this Court has jurisdiction over this appeal. MCR 7. 204(A)(1)(b).

law concerning admissibility, such as whether a rule or statute precludes the admission of the evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A. Hearsay and Confrontation Clause

1. Victim's Statements

Defendant argues that the trial court erred in admitting several statements made by the victim. Defendant asserts that the trial court's rulings contravene *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995) ("*Fisher II*"), and violated his constitutional right of confrontation.[2]

In *Fisher II*, *supra* at 454, our Supreme Court held that hearsay evidence of the victim's state of mind, i.e., statements where the victim "expressed fear of the defendant, or that depicted significant misconduct of the defendant tending to show him to be a 'bad person,' were inadmissible." However, the Court concluded that other evidence, including statements made by the victim (and known to the defendant) concerning her feelings for the defendant, the state of their marriage, her relationships with other men, her desire to pursue an education, her desire for independence, her plans to visit her lover in Germany, her intent to divorce the defendant, and statements contradicting statements made by the defendant to others about the victim, were all admissible. *Id*. at 445-446. The Court concluded that statements known to the defendant were admissible to show the effect they had on the defendant's state of mind, not for their truth, *id*. at 449-450, and that statements showing marital discord were highly probative of the defendant's motive and intent. *Id*. at 451-453. Conversely, statements not known to the defendant, such as the victim's travel plans, were found to be admissible under MRE 803(3), to show the victim's then-existing state of mind, emotion, sensation, physical condition (intent, plan, motive, design, mental feeling, pain, and bodily health). *Id*. at 450-451.

Fisher II was decided after the Supreme Court had earlier peremptorily reversed the defendant's conviction and remanded for a new trial in *People v Fisher*, 439 Mich 884, 885; 476 NW2d 889 (1991) ("*Fisher I*"), because the defendant had been deprived of a fair trial by the admission of highly prejudicial hearsay statements concerning the victim's state of mind, without a limiting instruction. In *Fisher I*, the Supreme Court relied on *People v White*, 401 Mich 482, 503-506; 257 NW2d 912 (1977), a case in which the Supreme Court held that statements circumstantially showing the victim's state of mind were admissible under MRE 803(3), but that when such statements also tend to prove other facts at issue in the case, such as the defendant's state of mind (or other disputed facts), there is a greater likelihood of prejudice that the jury will

[2] Defendant only briefly refers to the right of confrontation and, apart from citing *Davis v Washington*, ___ US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006), and *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), fails to develop this argument. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997); see also *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Accordingly, we consider defendant's Confrontation Clause argument abandoned.

consider the evidence improperly, thus requiring a cautionary instruction. Under MRE 403, the trial court must then decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id*. at 506-507.

Fisher II does not support defendant's argument in the present case. In general, the victim's state of mind was at issue in the present case because defendant's theory at trial was that any crime was committed by a stranger, and that defendant's relationship with the victim was not particularly acrimonious, considering that he had just proposed marriage to her and made a date for New Year's Eve. The statements concerning defendant's threats were admissible under MRE 803(3) to show the victim's then existing state of mind and her emotion concerning her relationship with defendant. Additionally, defendant admitted making the threats, including the statement about avoiding a custody fight, although he claimed that he was merely threatening to kidnap the child. The victim's statements to Monique Diederich were also admissible under MRE 803(2), because they concerned a startling event (a death threat), and Diederich testified that the victim sounded scared, her voice was trembling, and spoke hurriedly and fearfully when she made the statements.

The victim's application for housing assistance was admissible under MRE 803(6), as a record of a regularly conducted activity. The statement concerning the victim's need for bars on her windows was not admitted for its truth, i.e., to show that she in fact needed bars, and, therefore, was not hearsay under MRE 801(c). In any event, the statement was admissible under MRE 803(3), to show the victim's then existing state of mind and emotion. Jean Ulmer's testimony concerning the threats and custody fight was cumulative of Diederich's testimony. Further, it was admissible under *Fisher* because it was not introduced for its truth, but to show defendant's response (that he only meant to threaten to kidnap the child).

2. Probate Court's Judgment

Defendant argues that the trial court erred in admitting a probate court judgment declaring the victim dead. We disagree.

The probate court judgment was not "opinion testimony" subject to MRE 701 or MRE 702. Rather, the judgment was admissible under either MRE 803(8) (public records), or MRE 803(9) (vital statistics). Further, the judgment is explicitly made "admissible" by MCL 600.2106, and constitutes "prima facie evidence . . . of all facts recited therein," MCL 333.2886. Defendant's argument concerning the quality of the evidence received by the probate court, and his lack of participation in that proceeding, affect only the weight of the probate court's decision, not the admissibility of this evidence.[3] Additionally, the trial court instructed the jury that the standard of proof in the probate court proceeding was lower than in criminal cases, and that the probate court's judgment was not conclusive concerning the victim's time and place of death.

[3] Under MCR 5.125(17), defendant was not an interested person entitled to notice of the probate proceeding conducted under MCL 700.1208 (formerly MCL 700.492a), because he was not an heir of the presumed decedent, and apparently did not file a demand for notice under subsection (A)(7), or a motion to intervene.

Jurors are presumed to follow the court's instructions. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

3. Other Bad Acts

Defendant argues that the trial court erred in admitting evidence of other bad acts. Under MRE 404(b)(1), evidence of other bad acts is admissible to prove motive, intent, system, knowledge, and absence of mistake, among other things, when the same is material. *People v Sabin (After Remand)*, 463 Mich 43, 55-57, 60; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). However, such evidence is not admissible to prove the character of a person to show that he acted in conformance therewith.[4]

In the present case, defendant's motive, intent, and modus operandi were all material to the charge of first-degree premeditated murder. Defendant's threat to kill the victim was highly relevant and probative of his intent, and was properly admitted under MRE 404(b)(1).

Richard Ditchie's testimony about the victim arriving at his house, scantily clad, asking to call her mother, did not involve a prior bad act by defendant, and the victim's statements to Ditchie were admitted under MRE 803(2) (excited utterance) and MRE 803(3) (present sense impression), not MRE 404(b). Michael Borowiak, who owned the accounting firm whose building defendant was repairing on December 26, 1991, did not testify to any bad acts committed by defendant. Therefore, MRE 404(b) does not apply.

The evidence of defendant's 1996 assault on his wife, Maureen Pann, was relevant to the issues of motive, intent, plan, and modus operandi, proper noncharacter purposes under MRE 404(b)(1). Therefore, Candace Fulgenzi-Kingston's and Detective Naples's testimony concerning the attack on Pann was admissible under MRE 404(b).[5]

Pann's 1996 testimony at defendant's assault trial, including defendant's cross-examination, was properly admitted under MRE 804(b)(1), as former testimony given under oath, because defendant had an opportunity and similar motive to cross-examine the witness. Pann was properly found to be unavailable at defendant's trial in this case due to the trial court's ruling that she was exempt from testifying on the ground of privilege after she asserted her Fifth Amendment right not to incriminate herself. MRE 804(a)(1). Defendant has failed to show that the prosecutor committed any impropriety by threatening to charge her with perjury if she deviated from her previous sworn testimony. Furthermore, any error arising from Pann's failure to testify at defendant's murder trial was harmless, because, during her 1996 cross-examination,

[4] In his analysis, defendant confuses subsection (a) and subsection (b). While the evidence challenged by defendant on appeal was introduced in the prosecutor's case-in-chief, and defendant had not placed his character at issue, the evidence in question constituted evidence of other bad acts, governed by subsection (b), not character evidence, governed by subsection (a).

[5] Detective Naples's testimony regarding Pann's statement that defendant had tried to kill her was admissible as an excited utterance under MRE 803(2).

Pann recanted her allegations that defendant tried to kill her and testified that she must have been injured during the auto accident. Because this evidence was presented to the jury, it is not more probable than not that a different outcome would have resulted without the alleged error. *Lukity, supra* at 495

Additionally, the trial court instructed the jury that it was free to accept or reject Pann's prior recorded testimony, and further, the court gave a cautionary instruction concerning the proper use of other bad acts evidence and the prohibited character inference. The jury is presumed to have followed the court's instructions. *McAlister, supra* at 504.

B. Opinion Evidence

1. Opinion Regarding Identity and Premeditation

Defendant argues that the trial court erred in admitting opinion evidence by Deputy Chief Frank Troester, Detective Thomas Jenny, and the victim's mother. Defendant argues that the testimony was speculative, and that he was unfairly precluded from presenting similar speculative testimony.[6] Defendant also tersely argues that the testimony was inadmissible as either lay opinion testimony under MRE 701, or expert opinion testimony under MRE 702.

At the time of defendant's trial, MRE 702 provided that "[i]f the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[7] In this case, the trial court found that Deputy Chief Troester's specialized knowledge, based on many years of investigative experience, would be helpful to the jury to determine whether the victim was likely killed by a stranger or by someone she knew. Deputy Chief Troester's expert opinion was admissible under MRE 702.

Further, the trial court gave a cautionary instruction, CJI2d 5.10, concerning the weight of expert testimony, and also instructed the jury to evaluate the testimony of police officers in the same way as other witnesses. Such an instruction has been found to cure any error concerning improperly admitted police officer expert opinion testimony. See *United States v Lopez-Medina*, 461 F3d 724, 743-745 (CA 6, 2006).

The victim's mother testified that when defendant told her that he had been digging all day, her "immediate response was, oh, God, he buried her." Her testimony was based on her perceptions, i.e., how defendant made a living, the equipment he owned, how tired he seemed, as

[6] The trial court properly precluded defense counsel from inquiring whether defendant might have tracked mud into the jewelry store from having walked through the Lakeside Mall parking lot because there was no foundation for this question. Whereas evidence was presented that defendant's storage lot was unpaved and usually muddy, there was no evidence or testimony that the Lakeside mall parking lot was full of mud and debris.

[7] MRE 702 was amended on July 22, 2003, effective January 1, 2004, to require additional showings of reliability of expert evidence.

well as his statement that he had spent the day digging, and was helpful in determining a fact at issue, i.e., whether defendant was the perpetrator. Therefore, the testimony was proper lay opinion testimony under MRE 701.

Detective Jenny's opinions about the case were properly allowed because it was defendant who opened the door to this testimony. Detective Jenny initially formed opinions about the case that were inconsistent with the prosecutor's theories at trial. Defendant called Detective Jenny as a witness at trial to explore his initial theories, for the purpose of casting doubt on the prosecutor's trial theories. By doing so, defendant opened the door for the prosecutor to cross-examine Detective Jenny concerning his opinions about the case, including whether they had changed and the bases for his opinions. To preclude the prosecutor from doing so in the face of defendant's direct examination would have left the jury with the false impression that Detective Jenny only held opinions about the case that did not comport with the prosecutor's theories and evidence at trial. It was against this backdrop that Zarrick Butler's statement was offered, i.e., to explain the basis for Detective Jenny's opinion, a nonhearsay purpose. Considered in this context, Detective Jenny's testimony was not improper.

2. Opinion Regarding What the Victim Might Do

Defendant next argues that the trial court erred in allowing several witnesses to testify concerning what the victim might or might not do in a particular situation. In particular, several witnesses testified that, based on their knowledge and observations of the victim, she loved her daughter and would never abandon her voluntarily. Their testimony was based on their perceptions, and was helpful in determining a fact at issue, i.e., whether the victim disappeared voluntarily. The testimony was admissible as lay opinion testimony under MRE 701.

Before the grand jury, defendant testified that the victim would not stop to pick up a stranger. Therefore, the victim's mother's testimony to the same effect was merely cumulative. Additionally, her testimony was based on her observations of the victim, and was helpful to determining a fact at issue, i.e., whether the victim was likely to pick up a stranger who may have hurt her. Thus, it too was admissible under MRE 701.

3. "Snitch" Remark

Defendant argues that the trial court erred in admitting opinion evidence concerning what defendant meant when he used the word "snitch." Deputy Chief Troester's opinion was based on specialized knowledge, training, and experience as a police officer, and was helpful to the jury in determining a fact at issue, i.e., what defendant meant when he asked who snitched on him. Therefore, it was admissible under MRE 702. Additionally, a cautionary instruction was given concerning expert and police officer testimony. Defendant's argument that the witness was not an expert with respect to defendant's thoughts affects only the weight of this evidence, not its admissibility.

For these reasons, we reject defendant's several claims of evidentiary error.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his convictions. We disagree.

The sufficiency of the evidence is evaluated by viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), who may draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); see also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both "characterize a thought process undisturbed by hot blood." *Id*. Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing itself, and defendant's conduct before and after the murder. *Anderson*, *supra* at 537; *Furman*, *supra* at 308. Premeditation can also be inferred from the type of weapon used and the location of the wounds. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

In this case, the evidence showed that in July or August 1991 the victim ran out of defendant's home, scantily clad, and told a neighbor, Ditchie, not to call the police unless "he" came out. The victim amended an application for housing assistance in 1991, to state that she was moving out of her current residence due to violence in the home. When looking for a home, she remarked that she would need bars on the windows.

The victim moved out of defendant's home in mid-December 1991. Shortly thereafter, on Christmas Eve, defendant proposed marriage to the victim, but she turned down his proposal and told defendant that she wanted to date other men. Defendant threatened to kill her, and assured her that there would be no dispute concerning custody of their daughter. That night, defendant was observed "casing" the home of the victim's babysitter.

On Christmas day, defendant made a date with the victim for a New Year's Eve concert, but then angrily left the victim's mother's home when the victim either rejected his sexual advances or told him not to count on her going home with him on New Year's Eve.

The following day, the victim brought her child to daycare at 6:20 or 6:25 a.m., and a neighbor heard a gunshot at approximately 6:30 a.m. The victim did not appear for work that morning. Defendant was not very helpful in looking for her. Instead, he returned the engagement ring (tracking mud into the jewelry store with his shoes), may have gone to a building supply store, picked up his helper, and worked on a basement repair until approximately 3:30 p.m. Defendant did not return the victim's family's calls until approximately 9:45 p.m. He looked very tired and drawn out, and explained that he had been digging all day, and then went

shopping. Although witnesses could account for defendant's whereabouts for much of the day, his whereabouts between 3:30 and 9:45 p.m. could not be accounted for. While the family was looking through the victim's belongings, defendant took a signed affidavit of parentage, which he then filed on December 30, 1991.

The victim's car was found on December 30, 1991, in an area of Detroit known to defendant. A .25 caliber bullet and two spent shell casings were found inside the car. Blood in the car was consistent with the victim having been shot in the head, slumping forward, and then either falling or being pushed to the passenger side, enabling someone to get in and drive the vehicle away. The victim's body was never found and she was declared dead in 1995.

Defendant owned or leased various storage yards, and owned rental properties in the area where the victim's car was found. Defendant also owned construction equipment, and had excavating expertise.

Several years later, in 1996, defendant's wife moved out of the home and defendant threatened to kill her. Defendant hid in the back seat of her car and assaulted her while she was driving. He attempted to strangle her, and hit her repeatedly, telling her that she was going to die. When the police arrived, defendant sped away, causing a crash that injured his wife and a third party.

In the past, defendant had commented that someone he knew had gotten away with murdering his wife by getting rid of the body, and that the police could not prove a murder without a body. When defendant was finally arrested, in 2000, he asked who had "snitched" on him.

Viewed in a light most favorable to the prosecution, the foregoing evidence was sufficient to enable a rational jury to find, beyond a reasonable doubt, that defendant intentionally shot and killed the victim, with premeditation and deliberation, because their relationship had become strained and she wanted to begin seeing other men, and that he disposed of the victim's body, believing that he could not be caught if no body was found.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct that deprived defendant of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Here, however, defendant did not object at trial to most of the conduct he now challenges on appeal. We review unpreserved claims of misconduct for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

A. Shifting the Burden of Proof

Defendant first argues that the prosecutor improperly shifted the burden of proof at trial. We disagree.

A prosecutor cannot undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989); see also *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, a prosecutor may argue that particular evidence is undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998); *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). "Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." *Godbold*, *supra* at 521; see also *Fields*, *supra* at 105, 108-109, 115.

The prosecutor's comment in opening statement, that there was no evidence of defendant's whereabouts after completing a repair job, did not shift the burden of proof. It was made in the context of explaining that witnesses could account for defendant's whereabouts for portions of the day on which the victim disappeared, but not for an approximate six-hour period during which defendant could have disposed of the victim's body.

At trial, defendant advanced the theory that he had been working and shopping that afternoon. Thus, during closing argument, the prosecutor was entitled to point out that, except for the testimony of family members concerning what defendant told them, there was no evidence to support defendant's version of where he was. See *Godbold*, *supra* at 521; see also *Fields*, *supra* at 105, 108-109, 115.

We also reject defendant's argument that the prosecutor violated his duty to present exculpatory evidence by not introducing it at trial. Contrary to defendant's argument, the prosecutor does not have a duty to introduce allegedly exculpatory evidence at trial, only to make it available to defendant. In this case, there is no question that defendant knew that the evidence existed. He told the grand jury that the evidence was taken from him, presumably by the police. Thus, defendant cannot show that the prosecutor committed a *Brady*[8] violation. See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

Further, the crucial period in the prosecutor's timeline was between 3:30 p.m., when defendant finished working, and 9:45 p.m., when defendant called the victim's mother. Defendant does not claim that there was evidence of his whereabouts during this period. Rather, defendant told the grand jury that he was at a building supply store at approximately noon, just *before* picking up his helper, and that they finished the repair job at approximately 3:30 p.m. Because the evidence in question was not material to defendant's whereabouts in light of the prosecution's theory at trial, there is no reasonable possibility that it could have affected the outcome assuming it even existed and could have been produced. *Id.*

[8] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

B. Unsupported Argument

Defendant argues that the prosecutor committed misconduct by arguing that defendant had buried the victim's body 26 feet below the ground.

"A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). In this case, there was no evidence that defendant had buried the victim's body 26 feet deep. Thus, when the prosecutor mentioned the issue while questioning defendant's helper, defendant objected, and the question properly was stricken. An objection was again sustained when a similar comment was made while questioning Raymond Modad. During closing argument, the prosecutor only argued that, unlike most people, defendant owned a backhoe and had excavating experience. He did not mention a 26-foot deep grave.

Because the trial court sustained defendant's objections to the prosecutor's improper remarks, the court instructed the jury that the attorneys' comments were not evidence, and the prosecutor did not refer to a 26-foot grave during closing argument, defendant was not denied a fair trial.

C. Mischaracterizing Evidence

Defendant next argues that it was improper for the prosecutor to assert during closing argument that Grillo had positively identified defendant as the man she saw "casing" Sue Miller's home on Christmas Eve. There was conflicting evidence concerning the strength of Grillo's identification. Nonetheless, the prosecutor's argument was a fair comment on the evidence, and the reasonable inferences drawn therefrom. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); see also *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). Therefore, it was not improper.

D. Character Argument

Defendant argues that the prosecutor committed misconduct by making an impermissible character argument. We disagree.

The prosecutor's argument concerning the similarities between this case and defendant's 1996 attack on his wife was a permissible comment on the evidence. The prosecutor's statement that the attack on his wife demonstrates that defendant "is capable of surprising, ambushing and abducting a woman," was a proper response to defense counsel's argument that the two episodes were dissimilar and did not tend to show any kind of signature crime. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

The prosecutor's argument that defendant was volatile and angry, and capable of making the "no body/no crime" comment attributed to him, was also a proper response to defense counsel's argument that the statement was never made at all. The prosecutor did not exhort the jury to draw an impermissible character inference from defendant's assault on his wife. Additionally, the trial court gave a cautionary instruction concerning the proper use of this evidence, which the jury is presumed to have followed. See *McAlister*, *supra* at 504.

E. Deferring to the Opinions of the Police and the Probate Court

Defendant argues that the prosecutor committed misconduct by urging the jury to suspend its fact-finding duties and rely on the conclusions of the probate court and the opinions of police officers.

As discussed previously, the probate court's judgment was admissible as prima facie evidence of the facts stated therein. The prosecutor was entitled to urge the jury to rely on it to that extent. The prosecutor did not urge the jury to abdicate its fact-finding responsibilities. Further, the jury was instructed concerning the differences in the burden of proof, and that the probate court's judgment was not conclusive.

The prosecutor did not urge the jury to suspend its powers of reason and blindly rely on Deputy Chief Troester's and Detective Jenny's opinions. He merely expounded on his theory of the case, and responded to defendant's arguments questioning the officers' opinions, as he was permitted to do.

For these reasons, we reject defendant's claims that the prosecutor's conduct denied him a fair trial.

IV. Effective Assistance of Counsel

Defendant lastly argues that he did not receive the effective assistance of counsel. We disagree.

Because no evidentiary hearing was held, our review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994); see also *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy, and must further show that he was prejudiced by the error in question, i.e., that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216.

A. Calling and Interviewing Witnesses

Defendant argues that trial counsel was ineffective for not interviewing or calling to testify various individuals who reported seeing the victim or her car after the date of her disappearance.

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649

NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

In support of his motion for a new trial, defendant submitted several police reports that identified people who claimed to have seen someone who looked like the victim, or a car similar to hers, in Detroit, Pontiac, and Grand Rapids. According to the police reports, one of these sightings occurred on December 26, 1991, at 9:00 or 9:30 a.m., another occurred on January 3, 1992, and the others took place on December 28, 1991. However, the four sightings of the victim's car took place after her car was observed abandoned on Eastlawn Street. The purported sightings of the victim in Pontiac (at an AA meeting), and in Grand Rapids (hitchhiking and flagging down cars), were of suspect reliability. There was also a claimed sighting of the victim sitting in her car, on December 26, 1991, at 9:30 a.m., parked on I-696, just east of the Southfield Road exit. However, this report was also suspect because, by then, her mother had already driven on that freeway looking for the victim and her car. Defendant has failed to show that defense counsel's failure to investigate these questionable reports or call the witnesses deprived him of a substantial defense.

B. Evidence of Automobile Repair Shops and "Snitch" Remark

Defendant argues that defense counsel was ineffective for failing to introduce evidence that there were automobile repair shops in the area near Sue Miller's home that may have caused the noise that Gary Chupailo identified as a gunshot. Defendant also argues that defense counsel was ineffective for not calling the arresting or booking officer to testify that the snitch "incident was either fabricated or grossly distorted out of context."

The record contains no support for defendant's assertion that there were any repair shops around Miller's home, let alone one that was open for business at 6:30 a.m. on December 26, 1991. Additionally, despite counsel's vigorous cross-examination, Chupailo testified that he was certain that what he heard was a gunshot, and a spent bullet and two casings were recovered from the victim's car. On this record, there is no basis to conclude that defense counsel committed a serious error that deprived defendant of a substantial defense. *Davis*, *supra* at 368; *Flowers*, *supra* at 737.

Similarly, the record contains no support for defendant's claim that Officer Rice would have testified that the "snitch" remark was fabricated or exaggerated.

C. Toxicology Testing

Defendant argues that defense counsel was ineffective for failing to have the victim's blood tested for the presence of drugs, which defendant maintains would have rendered her disappearance predictable and understandable.

The record contains no support for defendant's claim that the victim used drugs, or for the argument that the disappearance and murder of a drug user is "quite understandable and almost expected." Additionally, counsel rationally may have chosen not to explore defendant's

drug theory because attacking the victim may have alienated the jury, and may have raised questions concerning whether defendant also used drugs.

D. Cross-Examination of Witnesses

Defendant argues that counsel was ineffective for failing to cross-examine Dr. Spitz with questions prepared in advance, and for improperly cross-examining Deputy Chief Troester and Detective Jenny.

Whether and how to impeach a witness is a matter of trial strategy entrusted to counsel's professional judgment. *Flowers*, *supra* at 737. The fact that a particular impeachment strategy does not work does not prove that counsel was inefficient. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Defendant's argument that, in hindsight, counsel's cross-examination of these witnesses should have been different does not support a claim of ineffective assistance of counsel.

E. Alternate Theory of the Victim's Disappearance

Defendant argues that defense counsel was ineffective for failing to present a coherent counter-theory of what happened to the victim, including presenting "information about robberies and sexually motivated abductions that occur routinely."

The record contains no evidence concerning the incidence of abductions during robberies and sexually motivated crimes. Additionally, because a defendant does not have the burden of proof at trial, voluntarily assuming responsibility for proving an alternate theory of the case is a trial strategy decision fraught with danger, that counsel wisely may have chosen to avoid. Defendant has again failed to overcome the presumption of sound trial strategy.

F. Probate Court's Decision

Defendant argues that defense counsel was ineffective for failing to call the probate court judge to testify concerning his decision to declare the victim dead.

As previously discussed, the probate court's judgment was admissible as prima facie proof of the facts stated therein. Defense counsel attempted to undermine the weight of the judgment by cross-examining various witnesses concerning their probate court testimony. It is difficult to discern what more could be accomplished by calling the probate court judge to testify—and risk antagonizing the jury. Defendant has again failed to show that he was deprived of a substantial defense.

G. Failure to Object

Lastly, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct.

Whether to object to an impropriety is a matter of trial strategy. *Matuszak*, *supra* at 58. In this case, defense counsel did not object to any of the instances of alleged misconduct raised by defendant on appeal, except the comments that allegedly shifted the burden of proof, and two mentions of a 26-foot deep hole. As discussed previously, however, there is no merit to

defendant's claims of prosecutorial misconduct. An attorney is not ineffective for failing to make a futile objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Defendant has again failed to overcome the presumption of sound trial strategy.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald